

1
2
3
4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
6

7 J & J SPORTS PRODUCTIONS, INC.,) Case No. 09-4944 SC
8)
9 Plaintiff,) ORDER GRANTING APPLICATION
10) FOR DEFAULT JUDGMENT
11 v.)
12)
13 MICHAEL DAVID CARDOZE,)
14 individually, and d/b/a MIKE'S BAR)
15 & GRILL,)
16 Defendant.)
17)
18)
19)
20)
21)
22)

23 **I. INTRODUCTION**

24 Plaintiff J & J Sports Productions, Inc. ("Plaintiff") seeks
25 entry of Default Judgment against Defendant Michael David Cardoze
26 ("Cardoze"), individually, and doing business as Mike's Bar & Grill
27 ("Defendant"). ECF No. 18 ("Appl. for Default J."). Having
28 considered the papers submitted, the Court concludes that entry of
Default Judgment is appropriate and GRANTS Plaintiff's Application.

29 **II. BACKGROUND**

30 The following allegations are taken from Plaintiff's
31 Complaint. Plaintiff is a California corporation with its
32 principal place of business in Campbell, California. ECF No. 1
33 ("Compl.") ¶ 6. Defendant is the owner and operator of Mike's Bar
34 & Grill in Hayward, California. Id. ¶ 7. Plaintiff was granted

the exclusive nationwide television rights to "'Unstoppable': Kelly Pavlik v. Bernard Hopkins, Light Heavyweight Championship Fight Program," an October 18, 2008 closed-circuit telecast of boxing matches and commentary ("the program"). Id. ¶ 9. Plaintiff entered into sublicensing agreements that gave commercial establishments in the hospitality industry the right to publicly exhibit the program. Id. ¶ 10.

Plaintiff alleges that Defendant unlawfully intercepted and exhibited the program at the time of its transmission at Mike's Bar & Grill. Id. ¶ 12. Plaintiff brings this action alleging violations of 47 U.S.C. §§ 605 and 553, conversion, and violation of California Business and Professions Code §§ 17200 et seq. Id. ¶¶ 8-36. Plaintiff seeks statutory damages under 47 U.S.C. §§ 605(e)(3)(B)(iii) and (c)(ii) and compensatory damages under state common law conversion. See ECF No. 18-5 ("Proposed Order").¹

III. LEGAL STANDARD

After entry of a default, the Court may enter a default judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do so, while "discretionary," Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980), is guided by several factors. As a preliminary matter, the Court must "assess the adequacy of the service of process on the party against whom default is requested." Bd. of Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. 00-0395, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2, 2001).

¹ Plaintiff's default judgment papers make no claim for relief under California Business and Professions Code §§ 17200 et seq. As such, the Court considers Plaintiff to have abandoned that claim.

1 If the Court determines that service was sufficient, it should
2 consider whether the following factors support the entry of default
3 judgment: (1) the possibility of prejudice to the plaintiff; (2)
4 the merits of plaintiff's substantive claim; (3) the sufficiency of
5 the complaint; (4) the sum of money at stake in the action; (5) the
6 possibility of a dispute concerning material facts; (6) whether the
7 default was due to excusable neglect; and (7) the strong policy
8 underlying the Federal Rules of Civil Procedure favoring decisions
9 on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir.
10 1986). "The general rule of law is that upon default the factual
11 allegations of the complaint, except those relating to the amount
12 of damages, will be taken as true." Geddes v. United Fin. Group,
13 559 F.2d 557, 560 (9th Cir. 1977).

14 15 **IV. DISCUSSION**

16 **A. Service of Process**

17 Federal Rule of Civil Procedure 4(e)(1) provides that an
18 individual may be served by following state law in the state where
19 the district court is located or where service is made. California
20 law provides that, in lieu of personal service,

21 a summons may be served by leaving a copy of
22 the summons and complaint at the person's . . .
23 usual place of business . . . in the presence
24 of . . . a person apparently in charge . . . at
25 least 18 years of age, who shall be informed of
the contents thereof, and by thereafter mailing
a copy of the summons and of the complaint . .
to the person to be served at the place where
a copy of the summons and complaint were left.

26 Cal. Code Civ. Proc. § 415.20(b). This method of service on a
27 natural person is available only after the exercise of "reasonable
28 diligence" proves ineffective in accomplishing service by personal

1 delivery. See id.

2 Here, after two attempts to serve Cardoze at Mike's Bar &
3 Grill, service was left with "Melissa Doe," the person in charge at
4 the establishment on November 30, 2009.² ECF No. 8 ("Proof of
5 Service"). The process server estimates that she was twenty-four
6 years old. Id. She was instructed to deliver the documents to
7 Defendant. Id. On December 1, 2009, copies of the summons,
8 complaint and other relevant documents were mailed to Defendant at
9 his establishment. Id. Furthermore, a document filed by
10 Defendant's attorney labeled "Reply to Plaintiff's Request for
11 Entry of Judgment," ECF No. 16, indicates the Defendant had notice
12 of this lawsuit.³ Accordingly, the Court finds that service of
13 process was adequate.

14 **B. Default Judgment**

15 The Eitel factors favor default judgment. Without default
16 judgment, Plaintiff will be prejudiced because Plaintiff will not
17 be able to recover its costs for purchase of the exclusive
18 distribution rights to the program. Other than filing one
19 document, which the Court has stricken from the record, Defendant
20 has failed to defend this lawsuit, despite encouragement by the
21 Court to file a motion to set aside the Clerk's entry of default.
22 See Order Granting Mot. to Strike. Thus, Defendant has made no
23 showing of excusable neglect.

24 ² Melissa Doe refused to provide her last name.

25 ³ The Court granted Plaintiff's motion to strike this document,
26 which was simultaneously filed in a number of different lawsuits by
27 Plaintiff against Defendant. ECF No. 17 ("Order Granting Mot. to
28 Strike"). In its order, the Court encouraged Defendant to file a
motion to set aside the Clerk's entry of default, which Defendant
has not done.

1 Accepting as true the allegation that Mike's Bar & Grill
2 intercepted and exhibited the program on October 18, 2008 without a
3 license to do so, Plaintiff has stated a claim under either § 605
4 or § 553 of title 47 of the United States Code. Section 605
5 prohibits the unauthorized interception of radio or satellite
6 communications, and § 553 prohibits the unauthorized interception
7 of cable signals. See, e.g., Cal. Satellite Sys. v. Seimon, 767
8 F.2d 1364, 1366 (9th Cir. 1985); J&J Sports Prods., Inc. v.
9 Manzano, No. 08-1872, 2008 WL 4542962 at *2 (N.D. Cal. Sept. 29,
10 2008) ("A signal pirate violates section 553 if he intercepts a
11 cable signal, he violates section 605 if he intercepts a satellite
12 broadcast.").

13 Plaintiff's conversion claim has merit. In California, a
14 claim for conversion has three elements: "ownership or right to
15 possession of property, wrongful disposition of the property right
16 and damages." G.S. Rassmussen & Assocs., Inc. v. Kalitta Flying
17 Serv., Inc., 958 F.2d 896, 906 (9th Cir. 1992). Here, Plaintiff
18 purchased the licensing rights to the program. Compl. ¶ 9; ECF No.
19 19 ("Pl.'s Aff.") ¶ 3. Mike's Bar & Grill exhibited the program
20 without a license to do so. Compl. ¶¶ 10-12. The Court therefore
21 finds that Plaintiff's substantive claims have merit and the
22 Complaint is sufficient.

23 Courts are less inclined to enter default judgment if there is
24 a large sum of money at stake. See Eitel, 782 F.2d at 1472
25 (denying default judgment where plaintiff sought almost three
26 million dollars). Here, Plaintiff seeks damages of \$111,800. See
27 Proposed Order. As explained below, the Court will be awarding
28 Plaintiff considerably less than this amount. See Part C, infra.

Hence, this factor does not weigh against entry of default judgment.

Finally, although federal policy favors a decision on the merits, Rule 55(b) allows entry of default judgment in situations such as this, where Defendant has refused to litigate. Overall, the Eitel factors favor entry of default judgment.

C. Remedies

1. Damages under 47 U.S.C. § 605

Plaintiff seeks the maximum statutory damages of \$110,000 based on a willful violation of § 605. App. for Default J. ¶ 5. Under this statute, an aggrieved party "may recover an award of statutory damages for each violation . . . in a sum of not less than \$1,000 or more than \$10,000, as the court considers just." 47 U.S.C. § 605(e)(3)(C)(i)(II). If the "court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages . . . by an amount of not more than \$100,000 for each violation" Id. § 605(e)(3)(C)(ii).

Plaintiff moves for damages under § 605, the statutory provision that applies to intercepted satellite signals. See Proposed Order. Plaintiff contends that it cannot determine the precise means the Defendant used to receive the program unlawfully because Defendant has failed to respond to the Complaint. ECF No. 18-1 ("Mem. of P. & A.") at 3. Plaintiff's investigator, Gary Gravelyn, declares that while he was at the establishment on October 18, 2008, a cable box was not visible, but the establishment had a satellite dish. ECF No. 18-3 ("Decl. of

1 Affiant"). In two previous cases involving the same parties,
2 courts in this district have awarded Plaintiff damages under either
3 § 605 or § 553, but not both. Compare J&J Sports Prods., Inc. v.
4 Cardoze, No. 09-4204, Order Granting Default Judgment (N.D. Cal.
5 Mar. 19, 2010) (granting default judgment and awarding statutory
6 damages of \$1000 under § 605) ("Cardoze I") with J&J Sports Prods.,
7 Inc. v. Cardoze, No. 09-5683, 2010 WL 2757106, at *3 (N.D. Cal.
8 July 9, 2010) (granting default judgment and awarding statutory
9 damages of \$1000 under § 553) ("Cardoze II").

10 Based on the declaration of Plaintiff's investigator,
11 Plaintiff's refusal to litigate, and the fact that Plaintiff
12 requests damages under § 605 only, the Court finds it appropriate
13 to award damages under this statute, rather than under § 553. In a
14 case containing similar allegations against the same defendant,
15 Judge Ware awarded Plaintiff \$1000 in statutory damages under § 605
16 and no enhanced damages. See Cardoze I. At the time of the boxing
17 match at issue in that case, there were eight patrons in the bar,
18 there was no cover charge, and there was no increase in the price
19 of food or beverages to profit from patrons viewing the fight. Id.

20 Similarly, here, at the time of the program, there were eleven
21 patrons in the bar, there was no cover charge, and there is nothing
22 to indicate there was any increase in the price of food or
23 beverages. See Decl. of Affiant. Nonetheless, this Court may
24 grant enhanced damages if there is evidence that Defendant is a
25 repeat offender. Kingvision Pay-Per-View, Ltd. v. Backman, 102 F.
26 Supp. 2d 1196, 1198-99. Two courts in this district have already
27 entered default judgments against Defendant based on similar
28 allegations. See Cardoze I; Cardoze II. In general, district

1 courts have "wide discretion in determining the amount of statutory
2 damages to be awarded." Harris v. Emus Records Corp., 734 F.2d
3 1329, 1335 (9th Cir. 1984). Accordingly, the Court awards
4 Plaintiff \$1000 in statutory damages, and the Court enhances the
5 award by \$1000.

6 2. Conversion

7 Plaintiff seeks \$1800 in conversion damages. Mem. of P. & A.
8 at 15. Plaintiff purchased the licensing rights to the program.
9 Pl.'s Aff. ¶ 3. Defendant's venue had a capacity of approximately
10 two hundred people. Decl. of Affiant. The rate to license the
11 program for a venue of this capacity was \$1800. Pl.'s Aff. Ex. 1.
12 Accordingly, the Court awards Plaintiff \$1800 in conversion
13 damages.

14 3. Attorney Fees and Costs

15 Under § 605, the Court "shall direct the recovery of full
16 costs, including awarding reasonable attorneys' fees to an
17 aggrieved party who prevails." 47 U.S.C. § 605(e)(3)(B)(iii).
18 Plaintiff has not provided any information concerning attorney fees
19 or costs. Thus, although mandatory, the Court cannot award fees
20 and costs at this time.

21 22 V. CONCLUSION

23 The Court GRANTS the Application for Default Judgment filed by
24 Plaintiff J & J Sports Productions, Inc. The Court awards
25 Plaintiff \$2000 in statutory and enhanced damages under 47 U.S.C.
26 § 605 and \$1800 in compensatory damages for conversion.

27 The Court ORDERS Plaintiff to send, by certified mail, a copy
28 of this Order to Mike's Bar & Grill and to Defendant's attorney,

1 Steve Allan Whitworth, at 28 Boardman Place, San Francisco,
2 California 94103. Plaintiff must file a proof of service within
3 five (5) days of this Order.

4 Within ten (10) days of this Order, Plaintiff shall file a
5 declaration accounting for its attorney fees and costs. Attorney
6 billing records and copies of cost receipts should be attached to
7 the declaration as exhibits. After consideration of this
8 declaration, the Court will enter judgment in the appropriate
9 amount in favor of Plaintiff and against Defendant. Failure to
10 timely file this declaration will result in a waiver of the request
11 for fees and costs.

12
13 IT IS SO ORDERED.

14
15 Dated: September 16, 2010

16 
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28